IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 282 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RANCHHODBHAI HAMIRBHAI PRAJAPATI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 282 of 1991

MR RG CHHARA for Petitioner No. 1

MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 17/01/2002

ORAL JUDGEMENT

1. In this appeal u/S. 374(2) of the Code of Criminal Procedure (for short 'Cr.P.C.') the appellant has challenged the order of conviction and sentence

passed against him by the Ld. Addl. Sessions Judge, Ahmedabad [Rural] at Mirzapur dated 31/1/1991 in Sessions Case No. 144/1987 for committing offences u/Ss. 376, 363 and 366 of the Indian Penal Code (for short ' IPC'). The Ld. trial Judge has imposed the sentence of RI for three years and to pay a fine of Rs.500/- in default further RI for one month on each count. He has also ordered the substantive sentences to run concurrently.

2. According to the prosecution, one Dhanajibhai Khimabhai was at the relevant time residing at Sarkhej with his family comprising two sons and two daughters. Name of the younger daughter was Kanchan. She was born in village Sathal and her birth was registered in the Panchayat office. Dhanajibhai was staying in a room near the brick kiln of one Sulemanbhai. In the said room his wife, daughter Kanchan and son Mansukh were also staying with him. They were engaged in the manufacturing of bricks. In the neighbouring room appellant was staying and he was also working in the same kiln. He happened to be the brother-in-law of the brother-in-law of Dhanajibhai.

2.1. According to the practice prevalent in the said kiln, the payment for the entire week's labour was being disbursed on every Friday. On one such Friday i.e. 10/4/1987 the labourers had received payment. On receipt of the payment Dhanajibhai went to Sarkhej for purchasing the grains and other household articles. The distance between the brick kiln of Sulemanbhai and Sarkhej is little over half kilometer. Mansukh was also with him. His wife had gone to visit some one in another brick kiln and his daughter Kanchan was all alone in the room. When they returned in the evening at about 5.00 O'clock to the kiln they found that Kanchan was missing and Dhanajibhai's wife Parvati was all alone in the room. They, therefore, commenced the search, during which it came to their notice that the appellant was also missing. They continued the search for about 15 to 17 days and made inquiries at the places of several relatives, but Kanchan and the appellant were not found. Ultimately Dhanajibhai went to the Police Station at Sarkhej and lodged complaint against the appellants. After receiving the complaint the police registered the offence at C.R. No. I 67/1987 and commenced the investigation. Two days thereafter the police could trace Kanchan and the appellant and they brought them back to Sarkhej. Kanchan was thereafter interrogated and her statement was duly recorded. She was also sent for medical examination. On completion of the usual investigation the police submitted chargesheet in the Court of the Judicial

Magistrate First Class, Ahmedabad [Rural] at Mirzapur against the appellant for offences made punishable u/Ss. 363, 366 and 376 of the IPC. The Ld. Magistrate in turn committed the case to the Court of Sessions as the offence u/S. 376 of the IPC is exclusively triable by the Court of Sessions.

2.2. At the trial the Ld. Addl. Sessions Judge, Ahmedabad [Rural] framed charge at Exh. 4 against the appellant for the offences mentioned against him which was denied by the appellant and he claimed to be tried.

2.3. In support of its case the prosecution examined 7 witnesses and also placed reliance on certain documentary evidence such as the complaint, the FSL report, the birth certificate of the girl and the relevant panchnamas. On completion of the recording of the oral evidence further statement of the appellant was recorded u/S. 313 of the Cr.P.C. In the course of the same the appellant was put all the circumstances which appeared against him in the evidence to enable him to render explanation thereto, if he so desired. However, the appellant had not come out with any specific case but his defence appeared to be that of general denial.

3. At the end of the trial, the Ld. trial Judge came to the conclusion that the prosecution had proved beyond reasonable doubt that the appellant had enticed away Kanchan out of the lawful custody of her father without his consent with a view to marry with her or with a view to have sexual intercourse with her. The Ld. Judge also came to the conclusion that the prosecution had proved beyond reasonable doubt that the appellant had falsely represented to Kanchan that they had legally become husband and wife and upon such misrepresentation he had obtained her consent for sexual intercourse. In the light of these findings the Ld. Judge convicted the appellant for offences punishable u/Ss. 363, 366 and 376 of the IPC and imposed sentence already referred to above. Having been aggrieved by the said judgment and order of conviction and sentence, the appellant has approached this Court by way of this criminal appeal.

4. At the hearing of the appeal Mr. R.G. Chhara, learned counsel has appeared for the appellant, whereas Mr. H.H. Patel, Ld. APP has appeared for the respondent State. According to Mr. Chhara, the Ld. trial Judge has erred in holding the appellant guilty of the aforesaid offences because considering the evidence on record it was very clear that the prosecution has hopelessly failed to prove its case against the

appellant. In other words, his submission is that there is no reliable evidence on record to base conviction of the appellant. He has submitted that so far the offence u/S. 376 of the IPC is concerned, the evidence of prosecutrix itself shows that she was a willing party to the act and she had whole heartedly surrendered herself to the appellant. He has further submitted that at no point of time the appellant either exercised the threat, force or any other illegal means nor he had made any false representation or promise to Kanchan with a view to obtain her consent for sexual intercourse. He has further submitted that so far offence u/S. 366 and also u/S. 363 of the IPC are concerned, there is no evidence whatsoever on record to show that it was the appellant who had enticed Kanchan to leave the lawful custody of her father and to come with him. Lastly he has submitted that this appeal deserves to be allowed and the judgment and order of conviction and sentence passed by the trial Court deserve to be quashed and set aside.

4.1. As against that, Mr. H.H. Patel, Ld. APP appearing for the State has vehemently supported the judgment and order of the trial Court and has submitted that the trial Court was fully justified, in light of the evidence produced by the prosecution to convict the appellant of offences made punishable u/Ss. 363, 366 and 376 of the IPC. He has submitted that the evidence of the complainant Dhanajibhai Khimabhai and that of the prosecutrix Kanchanben clearly shows that appellant who himself was a married person has extended false promise to Kanchan, who was also a married woman at the relevant time to marry her and by such promises he induced her to elope with him. He has further submitted that the entire purpose behind this was to have illicit relations with her. He has, therefore, submitted that even after leaving the parental home the girl was taken by the appellant to a place of appellant's relatives and she was subjected to sexual intercourse under false pretext that they would get married. He has further submitted that the appellant had gone to the extent of making false show of having married to Kanchan and thereby posing himself to be her husband and he enjoyed sex with her. According to him, the case of the appellant was therefore covered under clause (4) of section 375 of the IPC which is made punishable u/S. 376 of the IPC. Lastly he has submitted that the prosecution had conclusively proved that Kanchan was below the age of 18 years and, therefore, the appellant had committed offences u/Ss. 363, 366 as well u/S. 376 of the IPC, hence this appeal has no merit and it deserves no other fate but dismissal.

4.2. Both the learned counsels have taken me through the entire record of the case and have pointed out the relevant evidence on which they have placed reliance in support of their rival contentions. I have also gone through the evidence of witnesses examined by the prosecution with a view to reappreciate their evidence to enable me to decide this appeal.

5. Dhanajibhai Khimabhai P.W.1 Exh. 8 is the father of Kanchan. He has deposed that at the relevant time he was staying in a room situated adjoining to the brick kiln of one Sulemanbhai where he was working as a labour. With him his wife as well as daughter Kanchan and son Mansukh were staying. He has further stated that at that point of time the appellant was also staying there in a room adjoining to his room and he was also working as a labourer in the kiln. According to him all the labourers received weekly payment which was made on eery Friday. On 10th April, 1987 it being a Friday the labourers had received payment and he had gone with his son Mansukh to Sarkhej to purchase necessary articles and ration. His wife Parvati had gone to visit some one to the another brick kiln and girl Kanchan was all alone in their room. When they returned home, he found that his wife Parvati was all alone in the room and girl Kanchan was found missing. After waiting for the reasonable period they commenced search for her which lasted for about 15 to 17 days. According to this witness, at the initial stage of the search, they also noticed that the appellant was not to be found in his room. He, therefore, suspected that it was the appellant who had taken away girl Kanchan with him. Since the search of about 17 days proved futile, this witness ultimately went to the Police Station at Sarkhej and lodged complaint which is at Exh.9 on the record of the case. On receipt of the complaint the police during the investigation traced out Kanchan and the appellant within two days and brought them back to Sarkhej. This witness has stated that at the time of this incident Kanchan was already married, but she was not staying at her matrimonial home and till such time she went to the matrimonial home she was supposed to stay with parents. In the cross-examination by the defence he has stated that Kanchan was married to one Gordhan, but as Ana ceremony was not performed she was not sent to the matrimonial home. He has further stated that prior to her marriage Kanchan did not know Gordhan. However, she knew the appellant because he happened to be in their relation. Both of them had occasions to meet often and that was not liked by the witness as well as by his wife. He has further stated in the cross-examination that because of the frequent meetings between the appellant

and Kanchan they had fallen in love and on the day of incident when no body was at home she eloped with appellant. He has further stated that they realised on that very day that Kanchan and the appellant had run away but they did not think it fit to lodge complaint immediately because they first decided to make a search by themselves. He has lastly denied the suggestion of the defence that since Kanchan had a love affair with the appellant, he had filed a false case against the appellant.

5.1. The second witness is the prosecutrix Kanchan herself. She has been examined by the prosecution as P.W. 4 at Exh. 15. In examination-in-chief this witness has stated that appellant was the brother-in-law of her maternal uncle. At the time of incident she was staying in the brick kiln of one Sulemanbhai alongwith her father and mother. Her elder brother Mansukhbhai and his wife were staying in another brick kiln of Sulemanbhai. The appellant also stayed at the place where they were staying. According to this witness, about 12 months prior to the present incident she was got married to one Gordhan Dayabhai Prajapati of Maflipur and after the marriage she had stayed for about one week at her matrimonial home and during this time he and Gordhan had lived as husband and wife. After one week she returned to her parental home and she was to stay there till her Ana ceremony was performed. She has further stated that though appellant was married, his wife was not staying with him. That his sister and father were staying with him at the brick kiln. According to her, appellant used to visit their room and whenever he came there he used to have a normal talk with every member of the house. However, that was not liked by her mother and she used to scold her for talking with the appellant. The witness has stated that the appellant told her that they should get married. She has further stated that on 10th April, 1987 it was Friday and her father and son Dino had gone to make purchases at Sarkhej, her mother was sleeping inside the house, at that time sister-in-law of appellant came there and she had brought tea with her. Sister-in-law of the appellant offered the tea to witness and thereafter she lost all the senses and got mesmerized. After having the tea, she took Kanchan to her own residence which is situated in different brick kiln where she met the appellant. According to the witness, appellant also told her that they should run away and get married. She was thereafter taken away by the appellant. She has further stated that before going with the appellant, she had not gone to inform her parents about it. According to the witness, she was

first taken to a place of relative of the appellant in Odhav, whose name she was not knowing. At the place of the relative of the appellant, the appellant and the witness had slept together in one room at night and even at that time the appellant suggested to the witness that they should get married. She has further stated that she was already married. However, the appellant told her that if she observed any ritual (Badha) her husband would die and they would be able to get married. To this she readily conceded and thereafter the appellant had a sexual intercourse with her. At the place of the appellant's relative they stayed for about 2/3 days and thereafter they went to the place of another relative. At that place she had slept with the wife of the host, whereas the appellant had slept with the host. On the next day, however in the morning appellant took Kanchan to a well belonging to yet another relative of the appellant. There was a room near the well. That room had a terrace and they stayed for the night on the terrace and at that time Kanchan was subjected to sexual intercourse by the appellant. According to this witness, at the terrace appellant told her that though he himself was married, he would take divorce and marry her and they would then be staying together forever. This witness has further stated that appellant took her to Kalol Court and he told her that they would be getting married and so saying he went inside the Court room, whereas Kanchan was kept standing outside the Court premises. After returning from the Court room, the appellant informed Kanchan that their marriage was already over and that they had already become husband and wife. They exchanged garlands. They also went to the photo studio and got themselves photographed. After this, they ultimately went to the place of one Mukhi of the village. She told the appellant that since the Mukhi was to treat as her brother, she would stay with him. The appellant has also introduced himself as husband of the witness. In the house of the Mukhi appellant as well as the witness had sexual intercourse. She has stated that while the appellant and the witness were staying at the place of appellant's relative police arrived there and removed her to her parental home. Next day she was examined by the Medical Officer and her clothes were also seized by the police. In the cross-examination by the defence, she has stated before the police that her statement was recorded and in that statement she had not stated that appellant was married but his wife was not staying with him. She has, however, denied that she had not stated before the police that appellant used to tell her that they should get married and that the appellant's sister-in-law came there and made her to drink tea by which she lost all the

senses. She has further stated in the cross that it was not true that she had not stated before the police that from the hut of his sister-in-law appellant had taken her to village Odhav in a truck and also that at night she was again told by appellant that they should get married and at that time she told him that she was already married. She has further denied that she had not stated before the police that if some religious formality (Badha) is observed, her husband would die and they would get married. She has further denied that she had not stated before the police that the appellant had told her that since he had married to her he would keep her like a queen. She has further denied that she had stated before the police that she had not stayed even for a day at their matrimonial place. Her evidence shows that she has even denied having stated before the police that it was Friday and that her father and brother had gone to purchase household articles.

5.2. All these material contradictions which have come on record, by way of improvement in the evidence of this witness. have been duly proved by the defence by asking relevant questions to the Investigating Officer and the evidence of the Investigating Officer - Janaksinh Jayvantsinh Saraiya, who has been examined as P.W.8 at Exh. 29, clearly shows that the lady had many more things to be said in the Court than what she had stated before the police.

5.3. The prosecution has also relied on the evidence of certain other persons, but they do not take the prosecution case any further and hence I do not propose to deal with the same here. The evidence reproduced above clearly shows that both appellant as well as girl Kanchan had fallen in love and both of them had decided to run away and to get married. It may also be stated here that though Kanchan was already married to one Gordhan, it appears that she did not approve her marriage with Gordhan because when she was asked by appellant to observe any ritual so that her husband would die, she had readily agreed to do so. The evidence of complainant Dhanajibhai and that of Kanchan further shows that both these persons were in deep love and finding a suitable opportunity on 10th April, 1987 she eloped with the appellant. Her version that it was the sister-in-law of the appellant who had made her to drink some tea, which caused loss of her all senses and she got mesmerized and in that state of mind she left the house. All that had happened at the instance of the appellant. However, this story cannot be believed, firstly because it is of improbable nature and secondly because this fact was

never told to the police when the statement of this witness came to be recorded u/S. 161 of the Cr.P.C. If that be so, there is no reliable evidence on record to show that when Kanchan left her home, it was at the instance of the appellant or that she left it on her own accord. In absence of such evidence no liability can be fastened on the appellant that it was he who was responsible for alluring the girl out of the lawful custody of her guardian. In my opinion, therefore, the prosecution has not been able to prove offences made punishable under sections 363 and 366 of the IPC against the appellant and on that count the finding of the Ld. trial Judge is erroneous.

5.4. So far the offence u/S. 376 of the IPC is concerned, it is an admitted position that the girl Kanchan at the relevant point of time was over the age of 16 years. Her birth certificate has been produced, which amply proves this fact. Now the question remains whether the appellant made false representation to her to the effect that they were husband and wife and, therefore, she should allow him to have sexual intercourse with her. Though in the examination-in-chief Kanchan has time and again stated that it was the appellant who kept on telling her that they would get married and on that pretext he enjoyed her and even after some days he took her to Kalol Court and shortly thereafter made her believe that their marriage was already over and that they had become lawful husband and wife which relationship could allow them to have sexual intercourse with each other. If carefully scrutinised the evidence of this witness and in particular the cross-examination, it clearly shows that she had never stated this story before the police and it was for the first time that she came out with this version at the time of giving evidence before the trial Court. This aspect, if slightly viewed from different angle, would show that even when the appellant had not brought her to Kalol Court and made a show of their marriage being completed there, she had allowed him to have sex with her. It is, therefore, not difficult to understand that she was out and out a willing partner and she had whole heartedly given her consent to the appellant to have sexual intercourse with her. In light of such evidence I do not agree with and do not accept contention of Mr. Patel that this case would be covered by clause (4) of section 375 of the IPC. In my opinion, therefore, finding arrived at by the trial Court is definitely erroneous and the conviction of the appellant u/S. 376 of the IPC is bad in law.

6. In the result, this appeal deserves to be accepted and it is hereby allowed. The judgment and order of conviction and sentence passed by the Ld. Addl. Sessions Judge, Ahmedabad [Rural] at Mirzapur in Sessions Case No. 144 of 1987 dated 31/1/1991 are hereby quashed and set aside. The record shows that the appellant is on bail. Hence his bail bonds are ordered to be cancelled. Fine, if paid, to be refunded.

Muddamal articles to be disposed of in terms of the direction given by the Ld. trial Judge in the impugned judgment.

[AKSHAY H. MEHTA, J.]

* Pansala.